

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

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U.S. ATTORNEY  
CLEVELAND, OHIO

UNITED STATES OF AMERICA,

Plaintiff,

v.

CHEMICAL RECOVERY SYSTEMS, INC.,

Defendant and  
Third-Party Plaintiff,

v.

HARSHAW CHEMICAL COMPANY,  
Third-Party Defendant.

) Civil Action No. C80-1858

) Judge Aldrich

) MOTION TO DISMISS THIRD-PARTY  
) COMPLAINT AGAINST HARSHAW  
) CHEMICAL COMPANY OR IN THE  
) ALTERNATIVE TO SEVER THE  
) THIRD-PARTY CLAIM

US EPA RECORDS CENTER REGION 5



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Now comes third-party defendant, Harshaw Chemical Company, and moves this Court for an order dismissing the third-party complaint against it and vacating the ex-parte order granting defendant and third-party plaintiff, Chemical Recovery Systems, Inc., leave to file the third-party complaint against Harshaw.

In the alternative, Harshaw Chemical Company move this Court for an order severing the third-party claim against it from the claim of the United States of America and ordering a separate trial. The reasons for these requests are stated in the attached memorandum in support of this motion.

Respectfully submitted,

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Attorney for Third-Party Defendant  
Harshaw Chemical Company

Of Counsel:

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(¶13); and spilling waste materials from drums, transfer operations and still operations at the CRS site which have contaminated the soil and waters (Black River) into which they seep (¶20).

In addition, the government's Complaint lists seven hazardous chemicals, together with some metals, it says were identified in soil, water, air and drum samples collected at the CRS site and/or in the Black River (¶21). In the prayer for relief, the government seeks various forms of injunctive relief requiring CRS to cease polluting the air, water and soil, improve its operations, determine the nature and extent of contamination of soil and waters, including the Black River, caused "by chemical wastes stored, treated and disposed of on the CRS site" and remove and/or treat the contaminated soils and water. The Complaint also seeks civil penalties for violating the CWA and the reimbursement of the government for the funds it spent taking samples and investigating CRS.

On April 27, 1981, CRS filed an ex-parte Motion to File Third-Party Complaint against Harshaw and this Court issued an Ex-Parte Order dated April 28, 1981 granting CRS's motion. CRS's motion stated that information it recently obtained indicated the third-party defendant may be wholly or partially liable to CRS for the damages alleged by plaintiff in its Complaint and that complete relief could not be accorded by CRS.

The Third-Party Complaint alleges in broad terms that Harshaw's chemical plant, which is adjacent to CRS's plant site, has handled and disposed of chemicals and chemical wastes in violation of "Federal Law" (¶6) and that such wastes have polluted the Black River and CRS's plant site. It then seeks damages against Harshaw and a mandatory injunction to require Harshaw to remove all chemical wastes from CRS's property which

CRS may be required to remove. Although CRS does not allege any contractual relationship with Harshaw, express or implied, it contends it is entitled to be indemnified by Harshaw.

#### Argument

##### A. Harshaw Cannot Be Liable To CRS For The Plaintiff's Claim Against CRS

Rule 14(a) of the Federal Rules of Civil Procedure provides that a defendant may implead a person not party to the action only if that person "is or may be liable to him for all or part of the plaintiff's claim against him." Impleader under Rule 14(a) is allowed "only in cases where the third party's liability [is] in some way derivative of the outcome of the main claim." United States v. Joe Grasso & Son, Inc., 380 F.2d 749, 751 (5th Cir. 1967). Thus, courts have rejected the use of Rule 14(a) as a catchall for separate and independent litigation, even if the separate claim arises out of the same general set of facts as the main claim. United States Fidelity & Guaranty Company v. Perkins, 388 F.2d 771, 773 (10th Cir. 1968), United States v. Joe Grasso & Son, Inc., 380 F.2d 749, 751, supra.

Unless the impleaded party is or may be liable to the defendant for all or part of the plaintiff's claim, impleader is improper and should not be allowed.

The United States' claims are that the activities of CRS violated certain federal laws; the RCRA and CWA, and therefore it is entitled to certain injunctive relief against CRS as well as civil penalties and reimbursement for funds expended in investigating CRS. The issues in the government's case are whether CRS violated the provisions of the CWA or the RCRA. Even assuming arguendo that Harshaw committed the acts alleged

by CRS,<sup>1</sup> there is no basis for impleading Harshaw. Without the presence of Harshaw in the case, CRS is free to prove, if it can, that there were no violations or that Harshaw or someone else was responsible for the discharges of chemical wastes into the soil and water. Either CRS violated the statutes and is solely liable or it did not and escapes liability. If CRS is found to have violated either or both of the statutes, there is no basis for holding Harshaw derivatively liable. Any action against Harshaw is separate and independent from the United States' claims.

Furthermore, CRS seeks to recover damages against Harshaw although the government's Complaint does not request damages. This is a further indication that any action CRS may have against Harshaw is independent of the main claim of statutory violations and thus should be litigated separately. CRS's Third-Party Complaint appears to be nothing more than a desperate attempt to embroil Harshaw in a case involving allegations of statutory violations committed by CRS.

B. There Is No Basis For Indemnification By Harshaw

In paragraph 20 of the Third-Party Complaint, CRS alleges that, by virtue of Harshaw's acts and omissions, it is entitled to be indemnified by Harshaw against all lawsuits, costs and expenses. This is the only substantive basis for impleader given in the Third-Party Complaint. However, impleader under Rule 14(a) is proper only when a right to relief exists under the applicable substantive law. 6 Wright & Miller §1446 at 248 (1971).

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<sup>1</sup> The Third-Party Complaint does not even allege that Harshaw discharged any of the seven hazardous chemicals listed in the Complaint, although it does allege Harshaw discharged certain metals.

In cases in which an impleaded party's liability is predicated on an indemnity theory and jurisdiction is based on the existence of a federal question, the substantive law of the state controls. Kennedy v. Pennsylvania Railroad Company, 282 F.2d 705, 709 (3d Cir. 1968); 3 J. Moore Federal Practice ¶14.03 [3] (2d ed. 1980). Thus, the substantive indemnity law of Ohio is controlling in this case.

Ohio law recognizes a right of indemnity arising from either express or implied contract. See 18 O.Jur.3d, Contribution, Indemnity, and Subrogation §§35, 45 (1980), and cases cited therein. The Third-Party Complaint does not allege any facts which give rise to a right of indemnity under either express or implied contract and thus fails to provide a substantive basis for impleader under Rule 14(a).

C. Impleader Is Improper Because It Would Expand The Substantive Rights of CRS

CRS has impleaded Harshaw to indemnify it for its violations of the RCRA and the CWA, alleging that Harshaw has violated federal law. (Paragraph 6 of the Third-Party Complaint.) In order for CRS to bring a separate citizen's suit against Harshaw under either statute, it would have to comply with the sixty-day notice provisions of the citizen suits sections of both the RCRA<sup>2</sup> and the CWA<sup>3</sup>.

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<sup>2</sup> 42 U.S.C. §6972 (1976). The notice provision, 42 U.S.C. §6972(b), provides that "[n]o action may be commenced under paragraph (a)(1) of this section -

(1) prior to sixty days after the plaintiff has given notice of the violation (A) to the Administrator; (B) to the State in which the alleged violation occurs; and (C) to any alleged violator of such permit, standard, regulation, condition, requirement, or order. . . ."

<sup>3</sup> 33 U.S.C. §1365 (1976). The notice provision, 33 U.S.C. §1365(b), provides that "[n]o action may be commenced -

(1) under subsection (a)(1) of this section -  
(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order. . . ."

By impleading Harshaw rather than filing a separate suit, CRS is able to avoid the notice requirement. In as much as the notice requirement is a jurisdictional limitation, Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692, 701 (D.C. Cir. 1975), to allow CRS to circumvent it by use of Rule 14 expands that party's substantive rights, creating a remedy which would not otherwise exist. In Brennan v. Emerald Renovators, Inc., 410 F.Supp. 1057, 1062 (S.D.N.Y. 1975), the court ruled that "[w]here a statute vests in a particular party exclusive power to enforce that statute, impleader should not be permitted to expand the class of persons with standing to enforce it." Citizens are allowed to enforce the RCRA and CWA only after they have complied with the notice provisions. Impleader should not be used to expand the class of persons with standing to enforce the statutes by allowing CRS to file suit without giving notice. In addition, use of Rule 14(a) to enlarge or create substantive rights is forbidden. 28 U.S.C. §2072; Colton v. Swain, 527 F.2d 296, 300 (7th Cir. 1975).

D. Impleader Is Improper With Respect To  
The Request For An Injunction

In Ohio, the substantive right to indemnification places a duty on the indemnitor to reimburse an indemnitee for loss, damage, or liability. 18 O.Jur.3d Contribution, Indemnity, and Subrogation §31 at 356 (1980). It does not give a defendant the right to seek affirmative injunctive relief against a third party. In deHaas v. Empire Petroleum Company, 286 F.Supp. 809, 815 (D.Colo. 1968), the court dismissed a third-party complaint seeking injunctive relief, ruling that a separate lawsuit, not impleader, was the proper remedy. Similarly, CRS's request for affirmative injunctive relief is improper under Rule 14(a) and should be brought in a separate lawsuit.

E. Alternative Motion to Sever

Although Harshaw firmly believes its motion to dismiss should be granted, if this Court does not see fit to dismiss the Third-Party Complaint against Harshaw, it should at the very least sever the Third-Party Complaint and hold a separate trial thereon after a decision is rendered in the government's case against CRS.

It is apparent from the Complaint that the thrust of the government's action is based upon the particular activities of CRS in processing, transporting, storing and disposing of chemicals and chemical wastes at CRS's plant site. Obviously, the great bulk of the evidence would be directed toward CRS's operations, the nature of the chemicals and chemical wastes they process and store and their specific effect on the environment. It would be unduly burdensome to require Harshaw to be a party to what might be a lengthy trial involving a great deal of evidence which does not concern Harshaw.


In addition, it is apparent that, unless this Third-Party Complaint is dismissed or severed and a separate trial ordered, the trial of this action will be substantially delayed. Considerable discovery has already taken place between the government and CRS, such as interrogatories, requests for production of documents and depositions. In fact, on February 17, 1981 and February 23, 1981, counsel for CRS and the government filed their respective reports re: "First Meeting of Counsel." These reveal that the parties discussed settlement and agreed to a tentative schedule for completion of discovery with the latest date being May 11, 1981 which was for the filing of requests for admissions. They also indicate that the parties requested an unspecified extension of time due mainly to the contemplated ex-parte addition of third-party defendants.

As the government and CRS recognize, if Harshaw remains as a third-party defendant in this case, additional time will be required for Harshaw to review the discovery that has already taken place and Harshaw will require adequate time to engage in its own discovery--all of which will necessarily delay the time when all of the parties will be ready for trial.

In the event the Third-Party Complaint is severed, it should be set for a separate trial after the conclusion of the trial in the main case, since that trial may dispense entirely, or at least partially, with the claims of CRS against Harshaw.

For the foregoing reasons, Harshaw respectfully requests this Court to grant its motion to dismiss the Third-party Complaint against it, or in the alternative to sever the Third-Party Complaint and hold a separate trial thereon after a decision is rendered in the main case.

Respectfully submitted,

  
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Attorney for Third-Party Defendant  
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion to Dismiss the Third-Party Complaint and Memorandum in Support of Third-Party Defendant's Motion to Dismiss Third-Party Complaint were served by prepaid mail to the attorney for the Defendant and Third-Party Plaintiff, Gary J. McInerney, Esq., Murphy, Burns & McInerney, P.C., 4000 Campau Square Building, 180 Monroe, N.W., Grand Rapids, Michigan 49503 and the attorney for the Plaintiff, Kathleen Ann Sutula, Assistant U.S. Attorney, 400 U.S. Courthouse, Cleveland, Ohio 44114, on this 1st day of July, 1981.

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Eben H. Cockley  
Attorney for Third-Party Defendant